

NO. 82476-2

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

CITY OF ABERDEEN,

Respondent,

v.

FRANCIS REGAN,

Petitioner.

RECEIVED
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STATE OF WASHINGTON
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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR GRAYS HARBOR COUNTY

The Honorable F. Mark McCauley, Judge

SUPPLEMENTAL BRIEF OF PETITIONER

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A. INTRODUCTION

Francis Regan was found guilty of fourth degree assault in Aberdeen Municipal Court. Part of his sentence included probation. A condition of his probation was the requirement he have “no criminal violations of law.” Regan was charged with fourth degree assault and criminal trespass while on probation. A jury acquitted him of those offenses. Later, based on the same evidence presented at the criminal trial, the trial judge ruled Regan violated the “no criminal violations of law” condition of his probation finding he committed the criminal trespass despite the jury’s acquittal. The Superior Court reversed the trial court, ruling the “no criminal violations of law” condition required the State to prove a violation of a criminal statute beyond a reasonable doubt.

The standard applied to probation revocations is the proof must “reasonably satisfy” the court that a violation of the condition of probation occurred. To find a violation of a condition of probation, however, necessarily requires determining what the condition prohibits. The common meaning of “no criminal violations of law” is violation of a criminal statute. A violation of a criminal statute requires proof beyond a reasonable doubt. Regan’s acquittal meant the evidence was insufficient to find he violated a criminal statute. Because Regan was acquitted, as a

matter of law, the same evidence could not reasonably satisfy a court he violated the “no criminal law violations” probation condition.

Alternatively, Regan was entitled to clear guidance as to what actions or omissions would constitute a violation of his probation. The phrase “no criminal violations of law” is susceptible to two reasonable interpretations. One interpretation is the conviction or commission of crime, which requires proof beyond a reasonable doubt. The other, that a judge is reasonably satisfied an act occurred that would constitute a criminal offense. Because the phrase is susceptible to these two reasonable interpretations, it is ambiguous. Principles of fair notice and warning and the rationale supporting the rule of lenity logically and legally requires ambiguous probation conditions be construed in the probationer’s favor. When the “no criminal law violations” probation condition is construed in Regan’s favor, there was no violation of that condition unless the trial court found Regan was convicted of or committed the crime of criminal trespass. The jury’s acquittal foreclosed such a finding.

B. SUPPLEMENTAL ISSUES ON REVIEW

1. When the condition of probation prohibits “criminal violations of law” is the trial court required to find the probationer was

convicted or committed a crime to support finding probationer violated that condition?

2. Does the rule of lenity apply to ambiguous probation conditions?

3. Did the trial court err when it found a violation of the condition of probation that petitioner have “no criminal law violations” where the finding was based on the same evidence presented by the government at the criminal trial where the jury acquitted petitioner?

C. SUPPLEMENTAL STATEMENT OF THE CASE

Francis Regan, petitioner herein and respondent below, incorporates the statement of facts in the court of appeals decision. State v. Regan, 147 Wn. App. 538, 540-541, 195 P.3d 1015 (2008).

D. SUPPLEMENTAL ARGUMENT

THE TRIAL COURT’S FINDING OF A VIOLATION OF THE CONDITION OF PROBATION PROHIBITING CRIMINAL LAW VIOLATIONS REQUIRED EVIDENCE OF A CONVICTION OR PROOF BEYOND A REASONABLE DOUBT THAT A CRIME WAS COMMITTED.

Generally, a court's decision to revoke probation is discretionary. State v. Kuhn, 81 Wn.2d 648, 650, 503 P.2d 1061 (1972). The issue here, however, is whether Regan’s acquittal foreclosed the trial court from finding he violated the condition of probation that he has “no criminal violations of law.” Because determination of that issue is a question of

law, this Court stands in the same position as the trial court so the de novo standard of review is applied. State v. Womac, 160 Wn.2d 643, 649, 160 P.3d 40 (2007); State v. Garza, 150 Wn.2d 360, 366, 77 P.3d 347 (2003).

The standard of proof in a criminal trial is beyond a reasonable doubt. In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Decades ago, this Court held the standard applied to probation revocations is the proof must "reasonably satisfy" the court that the breach of the condition occurred.

At the probation revocation hearing, the court need not be furnished with evidence establishing guilt of criminal offenses beyond a reasonable doubt. . . . All that is required is that the evidence and facts be such as to reasonably satisfy the court that the probationer has breached a condition under which he was granted probation, or has violated any law of the state or rules and regulations of the Board of Prison Terms and Paroles.

State v. Kuhn, 81 Wn.2d at 650 (citations omitted).

Because of the different burdens of proof, this Court held that where a parolee is acquitted of a crime collateral estoppel does not bar a hearing officer from revoking parole based on the same evidence. Standlee v. Smith, 83 Wn.2d 405, 408-409, 518 P.2d 721 (1974). The appellate courts have likewise held a dismissal or acquittal of a crime does not bar a probation revocation based on the same conduct. State v. Barry,

25 Wn. App. 751, 611 P.2d 1262 (1980); State v. Cyganowski, 21 Wn. App. 119, 584 P.2d 425 (1978).¹

The issue here is not whether an acquittal in a criminal trial bars a trial judge from revoking probation in all cases where the decision to revoke probation is based on the same evidence presented at the criminal trial nor is it whether the beyond a reasonable doubt standard of proof applies in all probation revocation proceedings. The narrow question is whether under the specific condition of probation here, as a matter of law, to find a breach of the condition required the trial to judge to find Regan was convicted of or committed a crime beyond a reasonable doubt and whether Regan's acquittal foreclosed such a finding.

1. The "No Criminal Violations Of Law" Condition Of Probation Means Convicted Of Or Proof A Crime Was Committed Beyond A Reasonable Doubt.

Under RCW 3.66.069, "Deferral of sentence and suspension of execution of sentence may be revoked if the defendant violates or fails to carry out any of the conditions of the deferral or suspension." In the context of parole the United States Supreme Court has said, "The parolee has relied on at least an implicit promise that parole will be revoked only if he fails to live up to the parole conditions." Morrissey v. Brewer, 408 U.S. 471, 482, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972); See, Gagnon v.

¹ In his Brief of Respondent Regan argued Standlee, Barry, and Cyganowski are

Scarpelli, 411 U.S. 778, 781-82, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973) (probationer has same liberty interest as parolee). Regan was implicitly promised his probation would be revoked only if he committed a criminal violation of law. The determination that Regan failed “to carry out any of the conditions” of his suspended sentence or violated or failed to “live up” to a condition of his probation necessarily hinges on the meaning of the conditions he allegedly violated.

The condition of probation the trial court found Regan violated was he have “no criminal law violations.” Criminal means “[h]aving the character of a criminal offense; in the nature of a crime.” Black's Law Dictionary 380 (7th Ed. 1999). Violation means “[a]n infraction or breach of the law; a transgression” or the “act of breaking or dishonoring the law.” Id. at 1564. The common meaning of “criminal violations of law” is the commission of a criminal offense.

That the term “no criminal violations of law” reasonably means the conviction of a crime or commission of a criminal offense is also supported by the court’s analysis in Pattison v. Dep’t of Licensing, 112 Wn. App. 670, 673, 50 P.3d 295 (2002). The issue in Pattison was the meaning of the State Patrol implied consent warning. The warning read in part: “You are further advised that your license, permit, or privilege to

distinguishable. Brief of Respondent at 3-7 (incorporated herein by reference).

drive will be suspended, revoked, or denied if ...you are in violation of RCW 46.61.502, 46.61.503 or 46.61.504.” Id. at 676. Pattison argued the “in violation” language misled driver’s into believing that losing one’s license is an inevitable consequence of being arrested for one of the enumerated offenses. Id. The Pattison court rejected that argument and held, “[t]he more reasonable understanding of the warning, in context, is that the phrase ‘if you are in violation of’ means ‘if you are prosecuted and convicted for.’” Id. (emphasis added); See, Jury v. Dep’t of Licensing, 114 Wn. App. 726, 731, 60 P.3d 615 (2002), *review denied*, 149 Wash.2d 1034, 75 P.3d 968 (2003) (same).

Here, similar to the warning in Pattison and consistent with its common definition, the reasonable meaning of the phrase “no criminal law violations”, in context, is the conviction or commission of a crime. And, to prove the commission of a crime or to convict a person of a crime the government is required to prove each element of the crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Therefore, to support finding a violation of the probation condition that Regan commit “no criminal violations of law” required proof Regan was either convicted of or committed a crime beyond a reasonable doubt.

Regan was acquitted of criminal trespass. Yet, based on the same evidence presented at his trial for that offense, the trial court found Regan violated the “no criminal law violations” condition of his probation. His acquittal, however, means that evidence does not support the conclusion Regan committed a criminal offense beyond a reasonable doubt, a conclusion that was necessary to support the trial court’s finding Regan violated his probation.

2. The Rule Of Lenity Applies To Probation Conditions.

It has long been held that where the meaning or intent of a statute or court rule is ambiguous, it is interpreted against the government under what has been termed the rule of lenity. See, State v. Carter, 138 Wn. App. 350, 356-57, 157 P.3d 420 (2008) (ambiguous statutes requires resolution of that ambiguity in the defendant's favor); State v. Quintero Morelos, 133 Wn. App. 591, 137 P.3d 114 (2006) (rule of lenity applies to ambiguous court rules). The legal rationale for the rule of lenity is based on the most basic right of due process---that a person be given fair warning of prohibited acts if their liberty is at stake. See, United States v. Lanier, 520 U.S. 259, 266, 117 S.Ct. 1219, 137 L.Ed.2d 432 (1997) (“[T]he canon of strict construction of criminal statutes, or rule of lenity, ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered.”); see also, State v. Coria, 146

Wn.2d 631, 651-56, 48 P.3d 980 (2002) (Sanders, J., dissenting) (discussing at length the analytical connection between constitutional due process requirements and the rule of lenity).

The condition that Regan have “no criminal law violations” is at best ambiguous in the context of a breach of that condition. The ambiguity is revealed by contrasting the “reasonably satisfy” standard for finding a violation of a condition of probation with the common meanings of “criminal” and “violation” and the Pattison court’s holding that the phrase “in violation of” means prosecuted and convicted of a crime. It is reasonable to understand the phrase “no criminal law violations” to mean either proof beyond a reasonable doubt a criminal statute was violated or that a judge is reasonably satisfied a crime was committed. Because each interpretation is reasonable, the phrase is ambiguous. See, Moore v. Parrish, 38 Wash.2d 642, 645, 228 P.2d 142 (1951) (ambiguous simply means capable of being understood in more senses than one).

The Court of Appeals here noted the ambiguity, (“the phrase ‘no criminal law violations’ might be ambiguous”), but found “the rule of lenity does not apply in the probation conditions context.” Regan, 147 Wn. App. at 541 n. 1. There are no Washington cases that address whether the rule of lenity applies to an ambiguous probation condition. Courts in other jurisdictions, however, have reasoned the legal principle of

fair warning requires its application to ambiguous probation conditions. See, People v. Hoeninghaus, 120 Cal. App. 4th 1180, 1196 (2004) (ambiguous probation conditions should be resolved in favor of the probationer); Commonwealth v. Lally, 55 Mass. App. Ct. 601, 603, 773 N.E.2d 985, 988 (2002) (probationers are entitled to clear guidance as to when their actions or omissions will constitute a violation of their probation, thus as in criminal statutes ambiguities in probation conditions are construed in favor of the defendant); State v. Berger, 651 N.W.2d 639, 640 (N.D. 2002) (conditions of probation capable of two reasonable constructions are construed in favor of the offender).

Moreover, the same principles of fairness that informs the decisions applying the rule of lenity to ambiguous probation conditions led this Court to recently apply the rule outside its traditional application to ambiguous statutes and court rules. State v. Kier, 164 Wn. 2d 798, 194 P.3d 212 (2008). In Kier, this Court (citing State v. DeRyke, 110 Wn. App. 815, 824, 41 P.3d 1225 (2002), *aff'd on other grounds*, 149 Wn.2d 906, 73 P.3d 1000 (2003)), affirmed the rule of lenity applies to jury verdicts as well. Kier, 164 Wn. 2d at 811-812. This Court has also applied the same due process notion of fair warning, the analytical basis for the rule of lenity, to conditions of community custody. In State v. Bahl, 164 Wn.2d 739, 752-753, 193 P.3d 678 (2008), for example, this

Court held the due process vagueness doctrine, which requires citizens have fair warning of proscribed conduct, applies to conditions of community custody. See, In re Personal Restraint of McNeal, 99 Wn. App. 617, 627-634, 994 P.2d 890 (2000) (court held the liberty interest of individuals in community custody was analogous to that of parolees and probationers).

This Court's holdings in Kier and Bahl support two basic propositions; 1) due process fair warning requirements are applied to conditions of community custody conditions, which are analogous to probation conditions, and 2) the rule of lenity has legal applications other than to the interpretation of statutes or court rules. Consistent with those propositions, this Court should adopt the reasoning of some courts that have addressed the issue and hold the due process provisions of both the United States Constitution² and the Washington State Constitution³ requires ambiguous probation conditions are construed in favor of the probationer.

The application of the rule of lenity means the probation condition must be construed in Regan's favor. When construed in Regan's favor, the trial court was required to find a violation of a criminal statute beyond a reasonable doubt, at a minimum, to find Regan violated the "no criminal

² U.S. Const. amend. 14.

law violations” probation condition. As the Superior Court judge correctly ruled, “the chosen condition of ‘no criminal law violations’ requires that the burden of proof be beyond a reasonable doubt.” CP 55-56. Regan’s acquittal means he did not commit a criminal law violation and therefore he did not violate the condition he have “no criminal law violations.”

3. The Trial Court Abused Its Discretion When It Revoked Regan’s Probation.

A jury found the City failed to prove beyond a reasonable doubt that Regan committed trespass. Because a violation of the “no criminal law violations” condition of probation required, at a minimum, proof beyond a reasonable doubt that Regan committed criminal trespass, Regan’s acquittal, foreclosed the trial court from basing the violation on the same evidence presented the criminal trial. The Superior Court’s ruling the acquittal meant, as a matter of law, Regan did not violate the “no criminal law violations” condition of his probation was correct. Thus, the trial court abused its discretion when it found Regan violated that condition of probation.

E. CONCLUSION

The plain meaning of the condition of probation prohibiting Regan from committing any “criminal law violations” required the trial court to

³ Washington Const. art. 1, § 3.

find Regan was convicted of or committed a crime to support a violation of that condition. The standard for proving a crime has been committed is proof beyond a reasonable doubt. Alternatively, the phrase “no criminal law violations” is ambiguous and this Court should hold the ambiguity is construed in Regan’s favor. When the condition is construed in Regan’s favor, the court was likewise required to find Regan was convicted of or committed a crime. Because a jury acquitted Regan the trial court’s finding he violated “no criminal law violations” based on the same trial evidence is unsupported as a matter of law.

For the reasons above and the arguments in the Brief of Respondent and Petition for Review, this Court should affirm the Superior Court ruling and reverse the Court of Appeals decision.

DATED this 21 day of June, 2009

Respectfully submitted,

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

CITY OF ABERDEEN,)	
)	
Appellant,)	
)	
vs.)	NO. 82476-2
)	
FRANCIS REGAN,)	
)	
Respondent.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 29TH DAY OF JUNE 2009, I CAUSED A TRUE AND CORRECT COPY OF THE **SUPPLEMENTAL BRIEF OF PETITIONER** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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SIGNED IN SEATTLE WASHINGTON, THIS 29TH DAY OF JUNE 2009.

x *Patrick Mayovsky*